No. 143

Brief of Monteith for P. C. (1899)

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# Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed Oct. 30, 1899.

JACOB GARDNER, *et al.*,
*Plaintiffs in Error,*

*against*

LEWIS H. BONESTEL, Executor of the Estate of EBENEZER WORMOUTH, Deceased,
*Defendant in Error.*

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## Objections and Brief of Plaintiffs in Error on Motion to Dismiss and Affirm.

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GEO. W. MONTEITH,
*Attorney for Plaintiffs in Error.*

Filed Oct. 1899.

16965

# In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

*vs.*

L. H. BONESTELL, Executor of the Estate of EBENEZER WORMOUTH, deceased,
Defendant in Error.

OBJECTIONS OF THE PLAINTIFFS IN ERROR TO THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR HEREIN FOR WANT OF JURISDICTION AND TO THE MOTION TO AFFIRM THE JUDGMENT AND DECREE.

I.

The plaintiffs in error object to the motion of the defendant in error to dismiss the writ of error herein for want of jurisdiction and moves that it be denied upon the ground, that upon the face of the showing, made by defendant in error in the brief accompanying the motion, it is manifest, that the same is frivolous and without merit; and the plaintiffs in error make the same objection and motion with reference to the motion of defendant in error, joined therewith, to affirm the judgment and decree said writ of error is prosecuted to review.

II.

The plaintiffs in error object to the hearing of the motion of defendant in error, to dismiss the writ of error herein for want of jurisdiction, upon the ground that the defendant in error has failed to print either the whole of the record herein or sufficient thereof to enable the Court to determine the motion upon its merits, and thereupon plaintiffs in error move the Court that said motion be either denied for that reason or that the hearing of said motion be postponed such reasonable length of time as the Court may prescribe to enable the defendant in error to print the record and upon the condition that if the same be not so printed by the defendant in error within the required time that said motion to dismiss be for that reason denied; and plaintiffs in error make the same motion with reference to the motion of defendant in error to affirm the judgment and decree said writ of error is prosecuted to review.

Respectfully submitted,

GEO. W. MONTEITH,
Attorney for Plaintiffs in Error.

# In the Supreme Court of the United States.

JACOB GARDNER and PETER GARDNER,
Plaintiffs in Error,

*against*

LEWIS H. BONISTELL, Executor of the Estate of EBENEZER WORMOUTH, deceased.

## Brief of Plaintiffs in Error.

SYLLABUS.

There were two distinct sets of issues upon two distinct sets of pleadings, separately made up, separately tried, separately decided and incorporated in one judgment, viz: *Legal*, involving the title under a treaty—*Equitable*, involving a right to a patent (in the nature of a quitclaim) under a statute of the United States.

A third issue was also raised as to the jurisdiction of the State Courts to determine these issues. The evidence was without conflict and undisputed and all questions decided, questions of law.

*Legal issue*, involved our right and title to the land, as a right and title under the treaty of Guadalupe Hidalgo. The U. S. District Court in a final judgment in 1856 confirmed our right, title and possession as a right and title under the treaty. The Land Department more than twenty years thereafter decided the contrary and against our right, wholly as a matter of law. *The State Court's decisions were both against our right, holding purely as a matter of law, that the decision of the Land Department controlled and operated to dispossess us notwithstanding our sixty years' continuous possession, commencing 15 years prior to the treaty, existing when it when into effect and continuing ever since.*

*Equitable Issue*, involved a specific right, asserted solely as a matter of law to a federal patent to the land, under the 7th Section of Act of July 23d, 1866. "To quiet land titles in California"; a right based wholly upon our absolute title under the treaty; and because the land, although a part of, a Mexican grant, had been excluded from the final survey, by the land department; which upon undisputed evidence (none contrary to our claim) decided against our right, erring in its decision purely as a matter of law. The decision of both State Courts was against the right we claimed under that statute, to the patent (in effect a quitclaim to quiet our title).

*Jurisdictional Issue*, involved the jurisdiction of the State Courts to determine the subject matter of the controversy which determination as a matter of law, was as to whether the land under the treaty was public or private land; exclusive jurisdiction to determine all such questions having been vested in the Federal Courts under the Act of March 3, 1851.

The above is an abstract of the case and shows nothing but federal questions involved. They were raised in the pleadings, tried and adjudged, and adjudged against us. They are fully covered by the assignments of error a fact not questioned and therefore unnecessary to discuss.

## STATEMENT OF THE CASE.

The record in this case, without any material conflict, discloses, that on September 4th, 1834, Juan Reed, or Read, petitioned the Mexican Government to grant him a tract of land known as "El Corte de Madera del Presidio" (the place where wood is cut for the Presidio) (Tr., p. 169). The petition was granted October 2d, 1834 (Tr., p. 169–172). Under the Mexican law it became necessary for the magistrate nearest the land, to make an examination and survey; place him in physical possession; reduce the examination and survey to writing; and annex them to the petition and grant, which together with the *diseno* (a sort of a sketch map of the premises), would constitute the *espediente* or title papers of the grantee. This was all done in due form, and upon Nov. 28th, 1835, Juan Reed was placed in full possession of the rancho. The *espediente* appears on pages 169 to 174 inclusive, and upon pages 329 to 332 inclusive, of the transcript and the *diseno*,

or map, on page 79. They are not, as they should be, together, but will be found on the pages stated. The evidence shows without any material conflict that the land here in controversy is a part of that of which juridical possession was delivered to Juan Reed, Nov. 28, 1835. It also shows that he remained in possession of it down to the time of his death in 1843, when his four children succeeded to his title and possession. One of them, a minor, dying without issue, the other three, John J., Inez and Hilarita, became the sole owners of the rancho, and were in actual possession of it at the time of the Mexican war and of the adoption of the treaty of Guadalupe Hidalgo which provided that :

"Mexicans now established in territories previously belonging to Mexico * * * shall be free to continue where they now reside * * * *retaining the property which they now possess.*"

In order to give full effect to the provisions of the treaty, and to determine in accordance with its provisions, the extent of the public domain in California and where the boundaries lay, that separated the lands of the United States from those of private owners, Congress passed an act on March 3d, 1851, entitled "An Act to Ascertain and Settle Private Land Claims in the State of California" (9 Stat. p. 631). Under this act the final and conclusive settlement of all these questions was left *exclusively* to the District Court of the United States in California, subject to an appeal to the United States Supreme Court.

Under this act, proceedings were immediately begun by the Reed heirs against the United States before the Court of Land Commissioners. The usual decree affirming their title in all respects was duly entered June 13th, 1854 (Tr., p. 176–7). The United States appealed the case for a trial *de novo*, in the District Court for the Northern District of California, where the matter was fully heard, and on January 14th, 1856, the United States District Court rendered its decision and made its decree, affirming the judgment of the Board of Land Commissioners in all respects. In his opinion in the case, Judge HOFFMAN remarked :

"The case seems to present one of the few instances where every requirement of the law has been fully complied with."

1 Hoffman, Rep. 75 (Land Cases).

The United States declined to appeal and the decree became final April 2d, 1857 (Tr., p. 181).

In 1858, however, a dispute arose between the Reed heirs and

the United States Land Department as to whether or not the grant was one of specific quantity, to wit: one square league, or was one of specific boundaries without regard to quantity. It was not denied by the Land Department that Reed and his heirs had been granted and were in possession of the rancho as originally prescribed, and which included the land here in controversy, but the Land Department claimed that it had been confirmed to the extent of but one square league and asserted its right to reduce the rancho, from something like 1,500 acres more than a league, to exactly one league, and directed a surveyor by the name of Mathewson to make such a survey. The Reed heirs contested the survey, and while that contest was going on sold one-quarter interest in the excluded portion to Jas. C. Bolton. When the Land Department raised this question, a large number of persons, who in the vernacular of the country are designated "land jumpers" or "squatters" (Wormouth the defendant, in error being among them), conceived the idea that the excluded portion of the land would be open to settlement and immediately asserted their claims. Wormouth, as the record shows, attempted to enter the excluded portion in 1859, but made a mistake ; locating himself upon land which was not only in the original grant, but was included within the Mathewson survey. In 1864 he moved over upon the excluded portion and upon what is now a part of the land in controversy. The excluded portion at the time he went upon it, being in the possession of the Reeds heirs and Bolton. Bolton began suit in the United States Circuit Court in ejectment, and Wormouth was one of the defendants. The case was tried, judgment rendered in favor of the Reed title and Wormouth along with the others ejected September 28th, 1871 (Tr., p. 217). Wormouth again entered the land apparently about 1880 or 1881, and built the house and made the improvements upon which he predicated his homestead entry (Tr., p. 315). He had previously made several attempts to enter the land (Tr., p. 224) and filed several entries, and on May 20th, 1881, he made the final entry upon which he bases his present claim.

The case of Bolton *versus* Van Rynegan, which is the title of the proceedings in the Circuit Court, was appealed to the Supreme Court of the United States and the judgment affirmed by that Court.

Van Rynegan *vs.* Bolton, 95 U. S., 35.

In the meantime the contest in the Land Department upon the

Mathewson Survey had been pending thirteen or fourteen years and on January 6th, 1872, Secretary Delano rendered a decision holding in terms that the grant was one of boundaries and not of quantity, set aside the Mathewson survey and ordered a new survey in conformity to the decree of the District Court. An actual survey was never made in accordance with the ruling of that decision, but a map was compiled by two surveyors, Ransom and Allardt. This was also the subject of a great deal of contest in the Land Department. Two Secretaries of the Interior following Delano, as their public reports show, modified or attempted to set aside the decision of Secretary Delano, and later on Secretary Teller set aside both of their decisions and held that the decision of Secretary Delano was the rule to be followed in the Department, and that no subsequent Secretary had any power to change it under the law. Later on his decision was disregarded and a patent was issued and received by the Reed heirs in 1884, based upon the compilation of Ransom and Allardt (its western boundary following the yellow line on the colored map). The patent radically changes the original grant, it includes a portion that Mathewson excluded ; it excludes, however, the remaining portion of the grant which he excluded and which includes the land in controversy. This compilation also includes a large amount of unoccupied tide or salt-marsh land, which Reed never possessed and which was never included within the boundaries of the grant, indeed, a species of land never included in any Mexican grant ; a fact that stands uncontradicted as a part of the judicial history of this country. The Reeds, however, accepted the patent thirteen years after they had parted with all title to the portion of the grant the Mathewson survey excluded.

Bolton's interest in the excluded portion through mesne conveyances was acquired by S. R. Throckmorton, and the Reed heirs conveyed their interest in the excluded portion to various persons, all of whom on February 1st, 1871, conveyed their interest in the land here in controversy to Julius C. McCeney (Tr., p. 194–6), who received the same in trust for Throckmorton, conveying it to him January 19, 1875 (Tr., p. 196–7). Throckmorton, therefore, in 1875, absolutely succeeded to the entire Reed title to the premises here in controversy.

On October 20th, 1880, Throckmorton, in order to settle the question, remove a cloud upon and fortify his title, made application under an act of Congress entitled "An Act to Quiet Land

Titles in California," approved July 23d, 1866, to the Land Department for a patent, which would have the effect of being a quit-claim of the Government's claim to the land, and his application was contested by Wormouth (Tr., p. 93 to 236 inclusive). In support of his application, Throckmorton proved in the Land Department his title to the premises and also proved *without any evidence to the contrary, that the land here in controversy was a part of the land possessed by the Reeds.* There was no conflict in the evidence before the Land Department whatever, but the Land Department refused his application by a decision of Assistant Secretary Chandler, dated October 24th, 1891. *There were no issues of fact before the Land Department upon this application at all, there being no material conflict in the testimony, and as there was no dispute in the testimony and were no issues of fact to decide,* the decision of the Secretary is, as a consequence, simply *a decision upon the legal effect of the facts proved, standing as admitted facts*—a decision upon the law in the case alone.

While Throckmorton's application was pending before the Interior Department he died, and his only heir and daughter Susanna, succeeded to his estate and she in turn conveyed the property here in controversy to Jacob Gardner.

From 1835 down to the time of the conveyance to Jacob Gardner, the property had been in the lawful possession of Throckmorton, his daughter Susanna and his predecessors in estate, saving that during portions of the time Wormouth forcibly possessed himself of less than one-quarter of the 46 acres here in controversy. Wormouth himself in his testimony admits (Tr., p. 312) that he never was in possession of 33 acres of the 46. Jacob Gardner therefore went into legal possession of all of the property when he obtained his deed July 17th, 1890, and into actual possession of the 33 acres, being forcibly prevented by Wormouth from obtaining physical possession of the other 10 or 11 acres, all of which the record shows without any conflict. The condition as to possession which existed at that time, has existed ever since and still exists, Gardner being now in possession.

On May 20th, 1881, Wormouth filed in the Land Department, his homestead entry for this land. At that time Throckmorton was in lawful possession of it and was in actual possession of all except the portion that Wormouth possessed himself of by his forcible entry.

Upon July 29th, 1892, shortly after the Land Department had

refused Throckmorton's application to obtain the Government patent, Wormouth commenced this action in ejectment in the usual form in which all actions of ejectment are begun in California. (Tr., p. 1 to 9). The Gardners thereupon filed their answer (Tr., p. 9 to 19) and later on by leave of Court (Tr., p 19. to 20) filed a supplementary answer (Tr., p. 20 to 37 inclusive) amending their original answer. At the same time Jacob Gardner also by leave of Court filed his cross-complaint (Tr., p. 37 to 33) to which Wormouth filed his answer (Tr., p. 53a to 531 inclusive.) Two separate sets of issues were thus made up to wit : legal and equitable. They were separately tried, the equitable being tried first. There was no material conflict in the testimony on either branch of the case, no issues of fact made on either trial, notwithstanding which the trial Judge assumed to find upon issues as of fact in spite of the plain fact that the sole issues were issues of law upon uncontroverted facts.

The case was decided in Wormouth's favor by the Superior Court and the Gardners appealed to the State Supreme Court where the issues upon both the legal and equitable branches of the case were extensively argued. In the California Supreme Court the appellant challenged the jurisdiction of the California Courts to determine the legal branch of the case as it was simply a readjudication of a treaty right, that under the Act of March 3d, 1851, the United States Courts had exclusive jurisdiction to determine—in other words a case wherein the Superior Court had undertaken to redetermine whether the land in controversy was, under the treaty of Guadalupe Hidalgo, public or private land. The issues in the Supreme Court were grouped and argued under three heads, to wit : Legal Issues—Equitable Issues—Jurisdictional Issues.

The California Supreme Court affirmed the judgment of the lower Court upon all issues and rendered judgment against the rights asserted under the treaty and the statutes of the United States. In its opinion it declined to discuss the legal and jurisdictional issues and simply discussed the equitable questions.

## ARGUMENT.

*Explanatory.*—In the California Supreme Court, we discussed the case in its several branches, in the natural order—Legal—Equitable—Jurisdictional.

Upon this motion we will temporarily change the order by discussing the equitable issues first, as they bear more clearly and directly upon our first objection; *that the motion is upon its face frivolous.*

In the record the equitable issues rest upon the *cross complaint* of Jacob Gardner; the *answer* of Wormouth thereto; the *evidence* before the Court thereon, of which the *transcript of proceedings* in, and decisions of the Land Department on, are the main and material parts; the *decision* of the Superior Court, denominated "findings of fact and conclusions of law;" the *judgment* of the Superior Court; and, the *opinion* and *judgment* of the State Supreme Court. Of these the defendant in error, in his brief, prints simply the two *pleadings*, the *decision* of the Superior Court, the *judgment* thereof and the *opinion* of the Supreme Court, together with *a few fragments of the evidence*, upon the equitable branch. *The main part of the evidence upon the equitable issues is omitted*, which omission includes the most important parts of the vitally necessary transcript of proceedings in the land department.

Defendant in error in his motion asserts "that the only question involved in said action was a question of fact," etc., and this a most grievous blunder for the record without any question at all discloses *that the trial of neither branch of the case developed any question of fact whatever;* every material question presented for the determination of the Court, being a pure question of law upon the legal effect of evidence in which there was neither material nor substantial conflict; *the material facts all being undisputed and standing in the case as though admitted.* This being the case there could be neither question of fact nor finding of fact and any determination made by the Court in the case whether denominated or labeled "findings of fact" or otherwise must in the nature of things have been a decision upon the law—of the legal effect of facts admitted—admitted because uncontroverted.

*First Objection.*—This objection must be determined wholly upon the pleadings in the equitable branch of the case—the cross complaint of Jacob Gardner and answer thereto (both printed in our opponent's brief). The decision of the Court, denominated "findings of fact and conclusions of law" must be disregarded, because alone they are incomplete, in that nearly all the evidence in the record upon which they are based, is not printed on the one hand,

and on the other, the fragments printed negatively show (what is actually shown by the whole record) that there were no disputed facts, no issues of fact and no facts to determine, and, therefore, no necessity or warrant for any finding of fact at all. Indeed, the defendant, by printing portions of the record is not thereby entitled to raise a presumption in his own favor that otherwise could not appear. If he prints something that purports to be a finding of fact, he must also print with it, enough, at least, of the record to clearly show that there was an actual issue of fact before that Court upon which it could base a finding of fact—in short, that, whether the decision was of fact or of law, is not to be determined by its label. For these reasons these alleged "findings" must be disregarded.

The pleadings in the equitable issues show clearly that a federal question alone was before the Court for determination, to wit.:

The validity of Gardner's claim as the successor in interest of his predecessor in estate, Throckmorton's to a specific right—*a right* to a United States patent (in the nature of a quit-claim), *under a statute of the United States*, to wit.: "An Act to quiet land titles in California," approved July 23, 1866, 14 Stat. 218, a claim predicated upon *a right* and *a title* claimed solely *under a treaty of the United States*, the treaty of Guadalupe Hidalgo, *and under the* provisions of the *Constitution and laws of the United States*, relative thereto.

This cross complaint alleges all the facts essential to show, that if they are true, the right claimed by Gardner is a valid one and if they are untrue it is invalid.

Its validity or invalidity turns wholly upon the legal effect of the proceedings upon the application of Gardner's predecessor in estate, Throckmorton, in the Land Department. If, as a matter of law, the evidence before the Department established the right of Throckmorton to the patent under the act of 1866, and Gardner in this cross complaint, as his successor, asserts that right as the sole basis of the equitable relief he seeks under his cross complaint, then the only thing that could be put in issue by the answer, and the only thing there would be for the Court to determine would be the validity or invalidity of the right thus specially set up under this statute of the United States, and any decision the Court could render against Gardner, must, of necessity, have

been a decision against a right claimed under a statute of the United States, within the meaning of Sec. 709, Rev. Statutes.

While there were no issues of fact before the Superior Court as the record clearly shows, it is of no moment upon this objection. Defendant has printed none of the evidence showing the existence of any controversy (none being in the record in fact), the presumption is clearly against him and it is that there is no such evidence in the record.

It is simply the decision of the Court upon which its judgment was based. Whether the results it enumerates are decisions of law or findings of fact must be determined wholly by what the evidence in the record discloses. If it discloses no material conflict—no controversy or dispute as to the existence of any material fact—then every result arrived at and every determination made by the Court is nothing else than a conclusion of law upon the legal effect of facts standing as admitted.

Defendant in error then, not having printed anything showing the existence of a single issue of fact, the alleged findings printed must be treated as mere legal conclusions and practically disregarded leaving the pleadings alone from which must be drawn the existence of the federal question essential to the jurisdiction of this Court.

*Second Objection.*—This objection is based upon the failure of the defendant in error to print the material parts of the record. We hold that the Court cannot go into an examination of *the merits of this motion*, without examining the evidence contained in the record, not to determine any controverted issue of fact or any question of preponderance of evidence or the like, for the evidence being without material conflict stands as though admitted.

This branch of the case in the nature of things must be determined upon what transpired in the land department. To begin with, we assert our original right and title coupled with actual continuous possession of the land since 1835 and which right and title are secured to us wholly by the treaty of Guadalupe Hidalgo and by the Constitution and laws of the United States. The facts, we allege, afford no other legal basis to rest upon. The answer raises some issue upon some of these facts, but the evidence discloses that we fully proved them all—that the *legal effect of the evidence* we produced conclusively established our right and title

to the premises. Not a single one of these facts was controverted by the defendant in error even in the slightest degree. He simply produced his own deraignment of title *from and under the United States*, supplemented by his own oral testimony, and absolutely no other evidence upon this branch of the case, thus admitting every fact we established.

We proved a complete right, title and possession antedating the sovereignty of the United States *against and not under it*, and further proved that our right title and possession had been confirmed *as against the United States* many years before Wormouth applied for a federal patent. Wormouth on his part simply proved a paper title from the Government.

Our own right, title and possession as a basis upon which to predicate our right to a United States patent under the Act of 1866, therefore, stands in the record unquestioned and leaves as the only bone of contention upon the equitable issues as to what transpired in the land department, of which the transcript of proceedings (Tr., 93 to 236) with the decisions of its officers is the only evidence.

Defendant in error prints the decision and a few fragmentary portions of the transcript of proceedings. He asserts that simply "a question of fact," a "boundary" is all involved We assert there was no question of fact at all, simply because our evidence was not contradicted. To therefore determine the merits of this motion, the Court will have to examine the evidence, and we are entitled to discuss it, which we cannot until he prints it, as he is bound to do under the established practice of this Court. We do not ask this Court to look into the record to *decide facts*, but to determine whether or not the Superior Court *did or did not decide facts* and whether it could upon the case presented to it decide any facts. Defendant in error says the Court simply decided a single fact; this we emphatically deny and assert that the records shows that *the facts were all undisputed*, and there being no issue of fact, none could have been found, and that any determination the Court may have made, whether labeled, a finding of fact, or a conclusion of law, was no more and could have been no more than a decision upon the law—upon the legal effect or sufficiency of facts standing as admitted.

In Egan *v.* Hart, 165 U. S., 188, Mr. Justice WHITE, delivering the opinion of the Court, says, "and this Court may for the

purpose, not of deciding facts, but by way of throwing light upon the findings, look into the entire record."

Upon this branch of the case therefore the whole contention is over the decision of the Secretary. Was it a decision upon the law or the facts of the case? The evidence upon which it was based can alone determine and that is in the transcript of its proceedings (*supra*).

If it appears, as we claim, that the evidence was wholly unimpeached and wholly without conflict and that the legal effect of it was to fully establish our claim, but that notwithstanding the Secretary decided against us, his decision was therefore erroneous and we were entitled in a Court of equity to assert the right he thus denied us.

Rector *v.* Gibbon, 111 U. S., 276.
Johnson *v.* Townsly, 13 Wall., 72.
Moore *v.* Robbins, 96 U. S., 530.
Sheply *v.* Cowan, 91 U. S., 330.

While, therefore, as above shown, the Court could upon our first objection deny these motions it could not grant them until after a hearing upon the merits of the motion which requires the record substantially in full and which is not properly before it not having been printed.

## LEGAL ISSUES.

*Second Objection.*—The main legal issues in the case were decided by the Court, a jury being subsequently called to determine simply mere dependent questions as to damage for detention, rental value, etc. The matters determined by the jury are not of any moment upon this appeal, neither do they in any wise affect the legal rights of the parties, and only bind in case the defendant in error succeeds and are to enable the Court to determine the measure of his damage if he has been damaged.

The legal issues were framed upon the complaint which sets up an ordinary action of ejectment such as would commonly be brought against mere naked trespassers or intruders, and which is the customary form in California for raising all questions of title in an ejectment proceeding.

The Gardners as defendants in the State Court, first answer

generally denying the allegations of the complaint, and generally alleging ownership in the premises. They afterwards filed a supplemental or amendatory answer in which they averred specifically the original grant to Juan Reed, and Jacob Gardner's deraignment of a complete title from Reed specifying the mesne conveyances between Reed and Gardner, setting forth the proceedings of confirmation under the Act of March 3d, 1851, including the judgment of the District Court confirming the grant and alleging that the land in controversy was actually included within the boundaries of the grant.

This vitally important supplemental answer is not printed by our opponent, neither does he print the findings upon the issues upon the legal branch of the case, nor the judgment of the Supreme Court nor any of the necessary evidence.

The averments of title in the supplementary answer are substantally the same as those contained in the cross complaint of Jacob Gardner, and it states that its allegations are to further supplement and are in addition to each of the separate answers to the cause of action set forth in the complaint.

The allegations of the answer as amended by the supplemental answer set forth facts which show a complete title and right to the premises in controversy in Jacob Gardner the defendant in that case and the plaintiff in error here, under the treaty of Guadalupe Hidalgo, the Act of March 3d, 1851, and generally under the Constitution and laws of the United States. The title set up there is based upon no other authority or claim of right whatever, and could only be maintained by reason of the treaty of Guadalupe Hidalgo and the laws and Constitution of the United States. It could not have been decided in Jacob Gardner's favor upon any other ground whatever than that it was a right depending upon the provisions of that treaty and of the Constitution and laws of the United States, and the Court could only decide the case against Gardner by holding that Gardner was not thus entitled under the treaty. The evidence before the Court was wholly without any conflict whatever. The only evidence offered on the part of Wormouth was his patent, his homestead proceedings, and his own verbal testimony. He did not offer a scintilla of testimony to dispute the abundant testimony of Gardner that the land in controversy was within the boundaries of the Rancho Corte de Madera del Presidio as confirmed to and long possessed by the heirs of Juan Reed, and the fact that it was a part of the grant

stands as an admitted fact in the case, unimpeached, uncontradicted and unquestioned by as much as a breath of evidence to the contrary. The evidence in the case shows without the slightest conflict that the western boundary of the grant lay west of the land in controversy and upon the blue line shown on the colored map printed in this brief marked "A" to "A2." It also shows without any conflict that the northern boundary follows the waters of the Arroyo Holon, and the record further discloses that there is not a scintilla of evidence to show that the patent line—the yellow line—bounded the grant or was any part of the boundary of the grant. The United States Courts had held, both in the District Court, under the Act of 1851, and in the Circuit Court, in the case of Bolton against Van Rynegan, that the grant was one of specific boundaries and included all the land to which the Reed heirs were possessed and the possession of which they "had long enjoyed."

The decision of the Superior Court denominated "Findings of Fact, etc.," printed by defendant in error, relates solely to the equitable issues separately tried and determined.

The decision of that Court upon the legal issues will be found on pages 355 to 358 of the transcript and is not printed by defendant in error. Omitting the description of property it contains, it is

> "Determining the issues to be disposed of by it, the Court now finds the following facts from the evidence introduced upon this trial, viz.:
>
> 1st. That on the 1st day of February, A. D. 1891, the plaintiff, Ebenezer Wormouth, was, and for a long time prior thereto had been, the owner of and entitled to the possession of that certain piece or parcel of land." (describing it).
>
> "2nd. That on said 1st day of February, 1891, while said plaintiff was so seized and possessed of and entitled to the possession of said land and premises, the defendants, without right or title, wrongfully and unlawfully entered into and upon the same and ousted and ejected the plaintiff from the same * * * and ever since has been wrongfully and withheld and still withhold the possession thereof.
>
> The above being the conclusion of the Court on the issues submitted to it for determination, the Court hereby instructs you that your verdict must be in favor of the plaintiff, Ebenezer Wormouth, for the recovery of the land in controversy." (Description, etc.)

The above is the decision of the Court that determined the issues of right and title to the land in controversy. Was it decis-

ion of the law or of the facts of the case? Defendant in error says the latter, we claim exactly the contrary; that it was a decision upon the legal effect of undisputed facts. The evidence on this branch of the case will alone determine it, so that the Court can determine whether the Court, in making that decision, decided a federal question within the meaning of Section 709, R. S.

As on the other branch of the case, Wormouth simply produced the paper evidence of his claim if a title *under the United States*. He actually admitted that he never had possession of 33 or 34 of the 46 acres in controversy and only had a forcible possession of the other 12 acres, leaving the *legal possession* of the 12 acres a question of law for the Court to decide; on the other hand, we proved a complete chain of title to the land based upon the Mexican grant to Juan Reed in 1835; a grant finally adjudicated valid by the Federal Courts, under an act of Congress, passed for that purpose, as a specific right and title, depending for its force and effect upon the provisions of the treaty of Guadalupe Hidalgo.

In brief, there was but one question submitted to the Court for decision, viz.:

Which of these two titles was the legal one? That of Gardner which depended wholly upon the treaty or that of Wormouth, which was no more than the title of the United States, whatever it was. In determining this question, the facts being undisputed the Court was compelled to determine the very question the District Court had determined in 1856 to wit: Was this land under the treaty public or private land?

If public land, it was Wormouth's, he being the successor in interest of the United States. If private land, it was Gardner's, he being admittedly the owner of the title of the grantee. Wormouth produced not the slightest evidence to prove the primary title of his grantor, the government, while Gardner did fully prove not only the original title of the Mexican grantees but also proved that as between the government and his predecessors in estate, the Reed heirs, the title had been finally adjudicated against the claim of the United States (Tr., p. 179).

All in the world Wormouth presented in the way of establishing the primary title of the United States, was the naked patent and map upon which it was based—merely the decision of the Land Department, that under the treaty the land in controversy was public and not private land, a decision without any legal force because the Land Department's powers are limited to the disposi-

tion of public land, and what is admittedly so, it has no power to decide a question upon the title of one who holds against and not under the primary sovereign title of the Government. Ordinarily the showing made by Wormouth would be sufficient to establish a *prima facie* right to recover without any further proof of the title of the Government, it being ordinarily presumed that a Government patent implies that the Government title was valid, but there is a very broad and clear exception to that rule. That rule only applies in this case where there is no contest involved as to whether or not the land in controversy, ever was or was not a part of the Federal domain. It only applies in this case where both parties claim the land and neither party claims against the Government, but it cannot ever apply in any case where one of the parties denies the primary right of the Government to the land, and asserts as the basis of his claim a title in no wise dependent upon the primary sovereign title of the United States. In other words, the patent raises no presumption in a case where the United States is a party on one side and persons who claim *against* and *not under* the Federal title, are on the other, and the same rule naturally applies to the successors in interest of the Government and all those who claim against it. The Reed claim being one protected by the treaty and one against the Government, brings the case within the exception to the rule as to the presumptions contained in a Federal patent. This is because, in the case of public land, the Government *grants* the land and the patent is thereby conclusive evidence of title upon all those whose claims are under and not against the original claim of the United States; on the other hand, a patent for land whose title depends upon a treaty, and which antedates the sovereignty of the United States, is no more than a *quitclaim* of any interest of the United States in the land and raises no presumption whatever against the patentee

Adams v Harris 103 U.S. 593
Beard v Federy 3 Wall. 391

It was incumbent upon Wormouth to establish the title of the Government, which he did not do and made no effort to do, therefore, a finding of the Court in his favor without the evidence upon which to base it, and without the benefit of the presumption that would otherwise follow in the case of a patent, would be of no moment whatever. On the other hand, Gardner asserted a right and proved an absolute title to the premises, under the treaty, superior to, and *against that of the Government*, there being no conflict in the evidence, it became a question as stated which

of the two titles was valid? The one which depended upon the treaty or the one granted by the Land Department. The question, pure and simple, was a question as to whether a title which had been accompanied by sixty years' actual possession, and which was protected by the provisions of a treaty of the United States, and fortified by confirmation proceedings under an Act of Congress carrying the treaty into effect, could be set aside upon the mere showing that the Land Department, a branch of the Executive Department of the Government, had decided that the grant was different from what it had been adjudicated to be, and had issued a patent upon its decision. There was nothing else that the Superior Court was called upon to decide with reference to the ownership of this property.

It is more than patent that the Land Department had no such power or authority; *that while it could follow* the requirements of the decree of the District Court, and survey the land *in accordance with it*, it could not change its boundaries, or by refusing to give effect to the decree destroy vested rights under the decree and under the Treaty, upon which the decree was based, of those in possession of the property. Reduced to its last analysis, it places the Superior Court of Marin County, California, in the anomalous position of, not only undertaking to enforce an unauthorized adjudication of the Land Department, in readjudicating a settled title, but absolutely setting aside a decree of a Court of the United States vested with full power and exclusive jurisdiction to determine everything involved in the title to the grant.

Upon appeal to the Supreme Court this question was fully and extensively argued, and in its opinion the Supreme Court of the State of California refused to discuss this vital and all important question, and upon its failure to recognize this question the learned Chief Justice of the California Supreme Court granted this writ of error upon the ground that the California Courts had failed to give effect to a decree of the District Courts, confirming a specific right under the Treaty of Guadalupe Hidalgo.

The question before the Superior Court may be briefly stated thus: Which shall control—the decree of the District Court carrying the treaty into effect, or the decision of the Land Department nullifying it?

In the Supreme Court of California we pointed out specifically that the judicial power of the Land Department in no wise trenched upon the jurisdiction of the Federal Courts; that the judicial

power of the Courts was general in its nature and *was the only power that could be invoked to absolutely determine questions of title as between the Government and those who claim under it on the one hand, and those whose claim was against and who denied the existence at any time of the primary title of the Government* on the other; that the judicial power of the Land Department was merely *incidental to the exercise of its purely executive function* of disposing of public lands of the United States; that it simply had the power in a judicial manner to determine how or in what manner it would dispose of, or as to which of all rival claimants it would grant an admitted title of the Government to public lands. It could dispose of the land after its character was established but could not adjudicate whether it was in truth public land or not.

From this somewhat extended discussion of the case the Court can easily see that unless it denies the motions of the defendant in error upon the showing he makes, it can determine the motions upon the merits only upon a full examination of the whole record and that that under the established practice of this Court can only be had upon his printing the whole record and not merely such parts as might lend color to his side of the question. On this branch of the case he prints only the original complaint and the answer as it existed before amended by the supplemental answer and the judgment leaving out the supplemental answer containing our deraignment of title, all the evidence and the decision of the Court which are all essental to show both the existence of the federal question and that it was specially claimed in the State Courts.

## JURISDICTIONAL ISSUES.

In the California Supreme Court we expressly challenged the jurisdiction of the California Courts to determine this controversy.

It is true that upon the original pleadings, the Superior Court had *prima facie* jurisdiction to determine the case, but upon the filing of the supplementary answer, and upon the trial of the case when its real character was developed, it became apparent that all the questions at issue upon both branches of the case, were wholly and exclusively cognizable in the United States Courts. This is particularly true with respect to the issues upon the legal branch of the case, and as a further answer to the claim of the defendant in error, that no Federal questions are raised in this case, we un-

hesitatingly assert that not only is every question in the case a Federal question, *but they are questions which the Federal Courts alone have the power to determine.* The judgment of the Superior Court of Marin County, is nothing more or less than a readjudication of the original claim of the Reed heirs to the Rancho Corte de Madera del Presidio. The United States Court fixed one set of boundaries, and confirmed the possession of the Reeds to the grant within those boundaries, while the Land Department subsequently assumes to fix an entirely different set of boundaries and to change the whole character of the grant. Then the attempt is made to enforce the decree of the Land Department through the medium of the Superior Court of Marin County, California, and to obtain from that Court an adjudication in favor of a different set of boundaries and of a practically different tract of land from that confirmed by the United States District Court. In fixing the boundaries of the grant the United States District Court was simply demarking a line that separated the grant from the public land of the United States. It was saying in effect what was and what was not Government land under the Treaty, and the power to make this decision under the Act of March 3d, 1851, was vested by Congress exclusively in the District Court at *nisi prius* and in the Supreme Court on appeal. *The power to fix and adjudicate the primary sovereign title of the United States to lands in California as between the Government on the one hand and Mexican grantees on the other, was vested solely and exclusively in the Courts of the United States* under the Constitution and particularly in the District and Supreme Courts under the Act of March 3d, 1851. Congress alone can confer specifically the power and jurisdiction to make such an adjudication or determination, and it never conferred it upon any other tribunal than those named, and when the Courts of California undertook to adjudicate this question and alter the effect of the decree of the United States District Court, they exceeded their jurisdiction and their act was void. To show this absence of jurisdiction manifestly requires the record.

## REPLY TO DEFENDANT IN ERROR.

Mr. Bonistel, the counsel, who prepared this motion and the brief upon it, certainly has sadly misapprehended this case. It is only in justice to him to say that he only came into the case two weeks before he served the motion upon us.

He naively concedes that the treaty preserved our rights, a tardy concession that if made by his predecessors, would have relieved us of suing out this writ of error, for unfortunately the California Courts decided exactly the contrary, and we must reverse that decision or lose the land we and our predecessors in estate have held and possessed continuously for sixty-five years under a grant recognized by the treaty and confirmed by the United States District Court in a final decree in 1856.

He acknowledges (p. 77) that the only basis for those decisions against us is that the Land Department *decided* against the validity of our right and excluded the land from the final survey. A survey which simply carried into effect *a decision* of the department *upon the legality* of our right and title under the treaty the fact of our possession and the fact the land was within the lines of the grant, as granted to Reed and confirmed by the District Court, to his heirs as a right under the treaty, both stand as admitted, because not disputed.

He does not claim in the slightest degree that this land was not an integral part of that granted to Reed in 1835, possessed by him until his death and by his heirs when the treaty went into effect. He does not deny it is a part of the land which solely as a right and title under the treaty was confirmed to our predecessors by the final decree of the U. S. District Court in 1856. Nor does he dispute our continuous possession by our predecessors and ourselves ever since. He simply says the Land Office *decided* against us. He says two official surveys excluded it, not mentioning them, although the record does—the Mathewson and Ransome-Allardt surveys.

The former excluded it solely because the department claimed the grant to be one of *specific quantity*—one square league—and Mathewson cut off not only this land but a large amount afterwards included by Ransome, and not because it was not within the lines of the grant, but solely to bring the area down to a square league. This survey was set aside January 6th, 1872, by Sec'y Delano, who held the decree of the District Court must be followed. This eliminates that survey from consideration.

Ransome and Allardt then compiled the other "survey," and they took in more land in area than Reed ever claimed to possess, did not in hardly any particular follow the decree, and excluded this land. Neither in the evidence before the Land Department, nor in any af the other evidence in this case is there a single iota

of testimony to gainsay our statement that the controverted land was an integral part of the Reed Grant.

The fact the survey excluded the land is of no moment unless the evidence shows that it substantially followed the decree of the Court. A survey is only conclusive against those who *claim under* and *not against* the primary title of the Government.

If the decree of the District Court gave us Whiteacre, and the Land Department surveyed and decided we were entitled to Blackacre, neither its decision nor its survey could legally operate to dispossess us of and destroy our title to Whiteacre.

Counsel contends the decision of the Land Department "was final upon the rights of Throckmorton," and cites five cases to sustain it, not one of which does anything of the kind. They simply hold the well-established rule that in matters before the Department, *determinable by it*, the Courts will not review *questions of fact* they decide.

In each one of those cases, the parties on both sides *admitted the primary title of the United States*, and conceded the disputed land in each case was originally public land and the questions were all questions as to which of two claimants the Land Office would dispose of an admitted title of the United States. *In this case, on the contrary, we maintain the United States never had any right or title whatever to the land in dispute, and that by the treaty it is ours.*

Counsel next claims we sought the aid of equity to attack Wormouth's patent. We did nothing of the sort. We asserted that it belonged to us; that under the Act of 1866 we were entitled to the patent, and that by reason of an erroneous decision on the law, by the Secretary of the Interior, Wormouth received what belonged to us; as a specific right under the statute of 1866, and that in equity we were entitled to a decree that, as it was ours, he held it in trust for us.

There were no issues of fact before the Court at all on the equity issues, because as heretofore shown no dispute or conflict as to a single material fact. The mere fact the Superior Judge labeled his decision, "findings," etc., does not, as heretofore shown, determine their character.

The case of Egan *vs.* Hart, cited, only holds that where the decision of the Court below could be sustained, as it clearly was in that case, upon grounds other than those involving federal question, this Court was without jurisdiction.

The next point is that it is "but a question of boundary" and three cases cited, none of which have any bearing on this case.

The three cases simply hold that, as between neighbors who have admittedly good titles, the State Courts alone can say where the physical location of the admitted boundary is. That does not affect a case where the primary title to the land as between the Government on the one hand and those who claim against it on the other is in issue even though the title turns upon a single boundary line.

There is no question of a collateral attack of a survey involved here, no question of accuracy or professional fidelity on the part of the surveyor, nor any question as to the survey being erroneous as to any matter of fact.

We attack the authority for the survey, the power of the Land Department to first decide our right and title invalid, and then carry its decision into effect by making a survey in accordance with the lines of its, legally erroneous decision ; issuing a patent based upon it *and thereby depriving us of our land.* We hold that no such proceeding can avail to dispossess us of what is insured to us by the treaty. The Land Department could at most, make a survey and issue a patent to the land confirmed by the decree of the District Court, and if it adopted any other boundaries or assumed to patent any different land, its action so far as it materially varied the express mandates of the decree was wholly void. It could not take from the grant the triangular piece of land shown on the colored map as bounded by the blue and yellow lines (Blue, B to A 2 ; A 2 to B 2 and yellow, B 2 to B) and substitute for it the salt marsh (in green). Reed's heirs possessed the triangular piece and near which contained, as the record shows, the portion of the redwood forest granted to him *and from which the rancho takes its name,* "Rancho Corte Madera del Presidio," place where wood is cut for the Presidio. His petition to the Mexican Government shows (Tr. 166) that being unable to get the Sansalito Ranch he applied for the Corte Madera. Because he could not get the main part of the redwood forest he took the minor portion.

We simply claim that the Land Department was bound on the part of the government to quitclaim to the Reed heirs exactly what they were entitled to hold under the treaty—no more, no less—just that and nothing else.

The decision of Russell *vs.* Maxwell, 158 U. S., 253, simply holds that a survey is not open to collateral attack as to any ques-

tion of fact as to its accuracy as being a correct survey of an admittedly lawful title.

The point that we should have tried to remove the case is puerile. There is no statute authorizing the removal to the Circuit Court of an action between citizens of the State in which the action is brought. It is elementary that jurisdiction is always open to review.

The case as a whole shows that the one thing really at issue is our right to this land under the treaty. It is ours because our Mexican predecessors, the Reed heirs, possessed it when the treaty went into effect and were entitled to retain it as a valid right under that treaty. The final decree of the District Court forever settled the right and the title, and, whenever that right and title are assailed as invalid under the treaty, we have the right to have this Court review any such decision against our right. All the Land Department could lawfully do was to survey the land in accordance with the decree. It could not change or alter it or refuse to give it full effect. If it refused to give effect to the decree which established our right and title under the treaty, such refusal is nothing more or less than a decision against our right, and if a State Court in the face of complete unconflicting and undisputed evidence of our right and title, and of the decree confirming it, refuses to give it effect and bases its refusal solely upon the naked decision of the Land Department, unsupported and unsustained by any evidence, then its decision is a decision against our right and title under the treaty. So with reference to our equitable claim. If we proved without any dispute our complete right and title under the treaty and complied otherwise with the statute, and there was no controversy before the department as to any material fact, and it erroneously decided against us and our claim to the patent, such decision is a decision against a right under a statute of the United States and a decision of a Court based upon and sustaining it without any other basis is likewise, and such adecision may be reviewed in this Court.

## THE RULE STATED

In the late case of Capital Bank *v.* Cadiz Bank, 172 U. S., 430, MR. CHIEF JUSTICE FULLER states the test which determines the jurisdiction of this Court under Section 709 R. S.:

"If the denial by the State Court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the State Court thus disposed of a Federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that that the right was specifically claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which the judgment could not have been rendered.

Moreover, even though a Federal question may have been raised and decided, yet if a question, not Federal is also raised and decided, and the decision of that question is sufficient to support a judgment, the Court will not review the judgment."

The three questions here discussed are all strictly Federal questions:

Upon the legal branch of the case it wholly turned upon our right and title under the treaty,—Was it as a matter of law, public or private land? If private land then the title we asserted was admittedly valid. If public land then it might have been Wormouth's. *It required a decision against the treaty right we asserted upon which to base a judgment against us.* Eliminate all our evidence as to our title under the treaty and nothing remains upon which to raise any question at all.

Upon the equitable branch, our claim is wholly upon a right we claimed under the statute of 1866, upon undisputed evidence. Was our claim valid or invalid? There was naught else to decide. no judgment could have been rendered against us without first deciding against our specific right under a specific statute predicated upon a specific right and title under a particular treaty of the United States.

Upon the jurisdictional issues the Court by necessary intendment, held it had jurisdiction to readjudicate our right and title under the treaty, and to render a decision against it.

It was necessary to decide this treaty right to render judgment. That gives jurisdiction (a treaty being the same as a statute in that respect).

California Bank *vs.* Kennedy, 167 U. S., 365.

To raise the Federal question, it is only necessary that the record should show a complete title under the treaty. The treaty need not be specially pleaded.

Hickie *vs.* Starke, 1 Peters, 97.

The question must appear to have arisen by clear and necessary intendment.

Ocean Ins. Co. *vs.* Polleys, 13 Peters, 137.

And to have been necessarily involved.

Armstrong *vs.* Treasurer, 16 Peters, 281.

If the Federal question is presented by the record, and its decision is necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it is as much against the right, within the meaning of the section as if it had been specially referred to and the right directly refused.

Chapman *vs.* Goodnow, 123 U. S., 548.

## CONCLUSION.

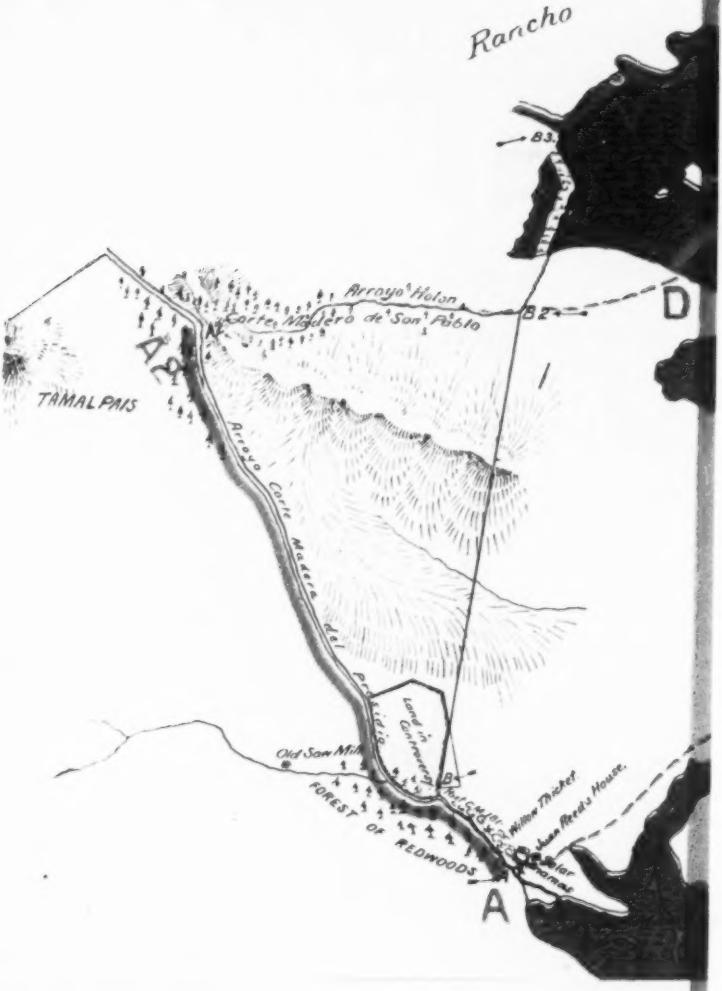
From the foregoing it will be seen that in a large degree the discussion of the merits of this motion argues the whole case and that a discussion of the objection we make necessitates nearly as much.

Our opponent contends that issues of fact were decided in the State Courts, evidently because upon the equitable branch of the case the Superior Court denominated its decision, "findings of fact and conclusions of law." He could not have read the record and arrived at any such result. The facts are wholly undisputed. However, as he makes the claim, he should print either the record or enough of it to *show* that a question of fact was raised that did not involve a federal question and that would support the judgment independent of it. The burden is on him to show it or have his motion denied; if, however, it is on us to establish the negative, then we are clearly entitled to have the whole record printed and thus before the Court together an opportunity to discuss it, either by filing an additional brief or orally as the Court may think best.

We submit, however, that upon the showing made by defendant in error the motions should both be denied.

Respectfully submitted,

GEO. W. MONTEITH,
Attorney for Plaintiffs in Error.

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